

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PORTFOLIO INVESTMENTS, LLC,
et al.,

Plaintiff,

v.

FIRST SAVINGS BANK, et al.,

Defendants.

CASE NO. C12-104 RAJ

ORDER

This matter comes before the court on the motion for sanctions of defendants Tax Attorneys, Inc., Susan Chang, and John E. Cicero II (“Moving Defendants”). Dkt. # 55. Plaintiffs Portfolio Investments, Inc., Steven Nikolich, and Marcia Nikolich (“Plaintiffs”) oppose the motion. Dkt. # 65.

BACKGROUND

On January 19, 2012, Plaintiffs initiated this action by filing a 429-page complaint. Dkt. # 1. They served Moving Defendants with the complaint on May 18, 2012. Dkt. # 16. On June 11th, Moving Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Dkt. # 39. On August 8th, this court struck Plaintiffs’ complaint *sua sponte*, allowing them to file an amended complaint of no more than 30

1 pages. Dkt. # 50. Plaintiffs filed their amended complaint on August 8th. Dkt. # 51.
 2 Moving Defendants filed a second motion to dismiss on August 22nd. Dkt. # 53.

3 Moving Defendants now ask that this court impose sanctions, in the form of
 4 reasonable attorney fees, arguing that both Plaintiffs' original complaint and amended
 5 complaint are frivolous and legally unreasonable. Dkt. # 55 at 4. They seek fees for the
 6 time that they spent reviewing, researching, and responding to each. *Id.* at 6.

7 ANALYSIS

8 Fed. R. Civ. P. 11 allows a court to impose sanctions when a party submits a
 9 pleading or other motion (1) for an improper purpose, or that (2) is unsupported by
 10 existing law or a nonfrivolous argument to modify existing law, (3) contains factual
 11 assertions unsupported by the existing evidence or the evidence the party reasonably
 12 believes will be discovered, or (4) contains unwarranted denials of factual contentions.
 13 Fed. R. Civ. P. 11(b).

14 This is not the first time that Plaintiffs' counsel, Dean Browning Webb, has faced
 15 sanctions in this court. In April 2012, this court issued an order to show cause as to why
 16 it should not impose sanctions against Mr. Webb under 28 U.S.C. § 1927. *Singleton v.*
 17 *Bank of America, N.A. et al.*, Case No. 11-1247-RAJ, Dkt. # 43. Although § 1927 is not
 18 at issue here, the *Singleton* order is instructive in highlighting the errors Mr. Webb has
 19 been warned about yet continues to make. For example, in *Singleton* the court noted that
 20 the complaint Mr. Webb filed contained a five-page, single-spaced footnote that added
 21 nothing of substance. *Id.* at 2. The court noted Mr. Webb's repeated, erroneous use of
 22 the "©" symbol when he cited to subsection "(c)." *Id.* at 3. The court noted Mr. Webb's
 23 propensity for filing overlength briefs in this district. *Id.* at 4.

24 Mr. Webb continues to make similar errors. In his response to the instant motion
 25 (as well as in his responses to the motions to dismiss), he includes what amounts to a one-
 26 page single-spaced footnote that repeats the same two citations and explanatory
 27 parentheticals 19 times. Dkt. # 65 at 6–7 n.1. Mr. Webb continues to use the "©"

1 symbol throughout his briefing. *See, e.g., id.* at 3. And, with regard to the instant
 2 motion, Mr. Webb filed a 15-page response, in which he incorporated by reference an
 3 additional 36 pages of briefing and 76 pages of exhibits.¹ Dkt. # 65 at 1.

4 What the court finds most troubling in this case, however, is Mr. Webb's apparent
 5 failure to research the relevant case law. *See* Fed. R. Civ. P. 11(b)(2). Mr. Webb has
 6 enumerated for this court the many RICO publications to which he has contributed. Dkt.
 7 # 66 ¶¶ 3–8. Yet in the briefing he has submitted on behalf of Plaintiffs, Mr. Webb has
 8 failed to acknowledge relevant Supreme Court and Ninth Circuit precedent. *See* Dkt.
 9 # 56 at 13–14; Dkt. # 78 (Order on Defendants' Motion to Dismiss) at 7–9. The
 10 arguments he makes regarding RICO standing and honest services fraud are contrary to
 11 existing authority, yet Mr. Webb neither addresses that authority nor argues that it should
 12 be “extend[ed], modif[ied], or revers[ed].” *See* Fed. R. Civ. P. 11(b)(2); Dkt. ## 78 at 7–
 13 9; 56 at 13–14. The court thus has concerns about Mr. Webb's compliance with Fed. R.
 14 Civ. P. 11(b)(2).

15 However, Moving Defendants' own briefing contains numerous 11(b) violations.
 16 For example, Moving Defendants argue in their motion to dismiss that “there was no
 17 allegation by Plaintiffs that any or which of the statements in the letter were false, also a
 18 requirement for alleging a predicate act.” Dkt. # 53 at 6. Yet the Ninth Circuit has
 19 specifically held that a false statement is not required for mail or wire fraud—one need
 20 only allege a scheme or artifice to defraud. *See United States v. Woods*, 335 F.3d 993,
 21 997–99 (9th Cir. 2003). Moving Defendants also repeatedly cite to foreign authority in
 22 their motion to dismiss, without providing any argument as to why this court should
 23 consider such authority persuasive. Dkt. # 53 at 4 (citing cases from the courts of appeal
 24 for the Third and Tenth Circuits), 5 (Seventh Circuit and Eastern District of

25 ¹ The response brief should have been limited to 12 pages, and Mr. Webb did not seek the
 26 court's approval to file an over-length brief. *See* W.D. Wash. L. Civ. R. 7(e), (g). Mr. Webb has
 27 repeatedly violated the local rules of this District regarding brief length. Any future filings by
 Mr. Webb that fail to comport with these rules will be summarily rejected.

1 Pennsylvania); 6 (Seventh and Eighth Circuits, District of Colorado, and Eastern District
2 of New York); 7 (Fourth and Seventh Circuits, and Southern District of New York); 8
3 (Tenth Circuit and District of Colorado); 9 (Third Circuit, District of Utah, and Middle
4 District of Florida); 10 (Third Circuit); 11 (Eleventh Circuit and Eastern District of New
5 York). Additionally, Moving Defendants erroneously argue in their motion for sanctions
6 that “[o]nce a Court finds that a party or an attorney has violated CR 11, it *must* impose
7 sanctions.” Dkt. # 55 at 6 (emphasis added). Fortunately for Moving Defendants, Rule
8 11 was amended in 1993. *See Foster v. Skinner*, 70 F.3d 1084, 1089 (9th Cir. 1995) (per
9 curiam). The rule now states that “[i]f . . . the court determines that Rule 11(b) has been
10 violated, the court *may* impose an appropriate sanction.” Fed. R. Civ. P. 11(c)(1)
11 (emphasis added). Finally, Moving Defendants filed an improper surreply with regard to
12 the instant motion, violating this District’s local rules. *See W.D. Wash. L. Civ. R.*
13 *7(g)(4)*. The court is not inclined to award attorney fees for the time spent researching
14 and preparing motions so replete with error.

15 The court is sympathetic to Moving Defendants regarding the time they spent
16 responding to the original 429-page complaint. However, the safe harbor provision of
17 Rule 11 bars an award at this late date. Pursuant to Fed. R. Civ. P. 11(c)(2), a party
18 moving for sanctions must first serve his motion on the non-moving party, allowing that
19 party to either withdraw or correct the challenged pleading. Here, the court dismissed the
20 original complaint prior to the filing of the motion for sanctions, and thus Plaintiffs have
21 had no opportunity to withdraw or correct it in response to Moving Defendants’ motion.
22 Sanctions are therefore improper. *See Barber v. Miller*, 146 F.3d 707, 710 (9th Cir.
23 1998) (finding sanctions unwarranted because “[b]y the time Imageware filed its motion,
24 the offending complaint had long since been dismissed”). Had Moving Defendants
25 timely filed their motion, the court likely would have exercised its discretion and imposed
26 sanctions.

CONCLUSION

For all of the foregoing reasons, Moving Defendants' motion for sanctions is
DENIED.

Dated this 21st day of March, 2013.

A handwritten signature in black ink, reading "Richard A. Jones", written over a horizontal line.

The Honorable Richard A. Jones
United States District Judge